



Nakhulo v Amwayi & another (Sued as personal rep of the Estate of Ibrahim Ochieno, alias Ibrahim Ochieno Khasimba (Deceased), pursuant to a Special Limited Grant of Letters of Administration Intestate issued on the 19th May 2022 in Chief Magistrate Miscellaneous Succession Cause No. 171 of 2022 at Busia) (Environment & Land Case E015 of 2022) [2023] KEELC 17926 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEELC 17926 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E015 OF 2022**

BN OLAO, J

APRIL 20, 2023

BETWEEN

FREDRICK WAMALWA NAKHULO APPLICANT

AND

DESTAR NAMUYONGA AMWAYI 1ST RESPONDENT

EUNICE MUGANDA 2ND RESPONDENT

**SUED AS PERSONAL REP OF THE ESTATE OF IBRAHIM OCHIENO, ALIAS
IBRAHIM OCHIENO KHASIMBA (DECEASED), PURSUANT TO A SPECIAL
LIMITED GRANT OF LETTERS OF ADMINISTRATION INTESTATE ISSUED
ON THE 19TH MAY 2022 IN CHIEF MAGISTRATE MISCELLANEOUS
SUCCESSION CAUSE NO. 171 OF 2022 AT BUSIA**

JUDGMENT

1. Fredrick Wamalwa Nakhulo (the plaintiff herein) is an advocate of this court. Destar Namuyonga Amwayi and Eunice Muganda (the Defendants herein) have been sued as the personal representatives of the Estate of Ibrahim Ochieno alias Ibrahim Ochieno Khasimba (the deceased) pursuant to a Limited Grant of Letters of Administration Ad Litem issued to them on May 19, 2022 for “purposes of filing, prosecuting and defending suit in respect of land parcel Number Bunyala/Mudembi/1738 (the suit land)”.
2. By an amended Originating Summons dated May 27, 2022 and amended on March 1, 2023, the plaintiff sought the following orders against the defendants in respect to the suit land:



1. A declaration that the plaintiff has openly and as of right had continuous possession use and quiet enjoyment to the exclusion of the late Ibrahim Ochieno and to the exclusion of the defendants as his personal representatives a parcel of land measuring 2.11 hectares to be excised out of the property registered at Busia County Land Registry as title No Bunyala/Mudembi/1738 secured by a steel gate and fencing as evidenced by facts in the survey plan of boundary and delineation distinctly marking the extent and size thereof and further evidenced by photographic imagery and current Google Earth application aerial view in the annexed affidavit in support of the application vindicating the Plaintiff's claim of open, continuous and exclusive possession and user as of right of a parcel of land measuring 2.11 hectares to be excised out of the property registered at Busia County Land Registry as title No Bunyala/Mudembi/1738 effective October 2, 1985 when the late Ibrahim Ochieno was registered as proprietor of the said property.
 2. A declaration that from October 2, 1997 or thereabouts, the late Ibrahim Ochieno alias Ibrahim Ochieno Khasimba upto his death in or about 2015 held the said 2.11 Hectares out of the land parcel No. Bunyala/Mudembi/1738 and which is under the active and exclusive possession and user of the plaintiff as a bare trustee thereof and in trust for the plaintiff pursuant to the provisions of section 65 of the [Land Registration Act](#) and sections 7 and 38 of the Limitation of Action Act.
 3. An order to give effect to the said declaration ordering exclusion or mutation of the said property registered in the name of Ibrahim Ochieno as title No Bunyala/Mudembi/1738 to the fullest extent of the fencing of the homestead thereof and in tandem with the delineations thereof and the registration of the title of the said land in the name of Fredrick Wamalwa Nakhulo as absolute proprietor thereof and the cancellation of the title No. Bunyala/mudembi/1738 and cancellation of all or any references to the late Ibrahim Ochieno as proprietor thereof.
 4. An order of injunction do issue restraining the defendants as Administrators of the Estate of the deceased Ibrahim Ochieno, their servants or agents from entering or encroaching upon, taking possession, surveying, sub-dividing, selling, disposing, alienating, distributing, transferring, charging or howsoever dealing with or trespassing on or interfering with the Plaintiff's quiet possession and enjoyment of the said parcel of land to the fullest extent of the fencing of the homestead thereof and in tandem with the delineations and boundary as per the survey plan thereof.
 5. That the honourable court be pleased to order the Land Registrar Busia County to rectify the register to reflect the plaintiff as the owner of the said parcel of land measuring 2.11 hectares to be excised out of title No Bunyala/Mudembi/1738.
 6. That the honourable court be pleased to make any orders deemed just or expedient.
 7. That there be no orders as to costs.
3. The Originating Summons is supported by the Plaintiff's affidavit dated May 27, 2022. It is the plaintiff's case, as deposed in that affidavit, that the defendants are the personal representatives to the Estate of the deceased who was registered as the proprietor of the suit land on 2nd October 1985. However, since 1982 when the plaintiff obtained possession of the suit land and upto 2015 when the deceased died, he has enjoyed exclusive possession of the land where he has put up his residential home and planted exotic trees and no person has complained or set foot on the same with the intention of



dispossessing him. That Ken Masibo the surveyor with the Busia County Survey Office has delineated the boundary to the extent of the portion of the suit land which the Plaintiff occupies.

4. The plaintiff annexed to his affidavit the following documents:
 1. Certificate of official search for the land parcel No Bunyala/Mudembi/1738 registered in the name of Ibrahim Ochieno and measuring 4.0 hectares.
 2. Photographs showing a homestead, trees and a gate.
 3. Limited Grant issued to the Defendants in Busia Cm Succession Cause No 171 of 2022 limited for purposes of this suit.

The records shows that both on August 24, 2022 and March 2, 2023, the plaintiff personally served the defendants with the original and amended Originating Summons and other documents.

5. However, as at March 13, 2023 when the matter came up for hearing by way of formal proof, the defendants had not filed any replying affidavits nor any other pleading in response to the Originating Summons. The suit therefore proceeded to hearing ex-parte.
6. During the plenary hearing, the plaintiff adopted as his evidence the supporting affidavit dated May 27, 2022. He also produced as his documentary evidence the documents annexed thereto. He also called as his witness Kennedy Masibo (PW2) a County Surveyor with the Busia County who told the Court that the Plaintiff occupies a portion of land measuring 2.11 hectares out of the suit land. That the same is clearly demarcated on the ground.
7. The Plaintiff has approached this Court seeking orders that he has acquired by way of adverse possession a portion of land measuring 2.11 hectares out of the suit land which, as per the certificate of official search, measures 4.0 hectares. It is not in doubt that the suit land has since 2nd October 1985 been registered in the names of the deceased. It is also not in doubt that the Defendants hold a Limited Grant of Letters of Administration issued to them on 19th May 2022 limited for purposes of prosecuting and defending this suit in respect to the suit land.
8. Section 38 (1) of the *Limitation of Actions Act* allows a party to apply to the court to be registered as proprietor of land by way of adverse possession. It reads:

38.

- (1) “Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

Section 7 of the same Act provides:

- 7: “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

Section 13 (1) of the same Act reads:

13

(1)



“A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.”

Finally, section 17 of the said Act states that:

17.

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

It is now well established that the combined effect of the relevant provisions of sections 7, 13 and 17 of the *Limitation of Actions Act* is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession – *Benjamin Kamau & others v Gladys Njeri* CA Civil Appeal No 2136 of 1996.

9. In *Kasuve v Mwaani Investments Ltd & others* 2004 1 KLR 184, the Court of Appeal set out what a person claiming land by way of adverse possession must prove. It said:

“And in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – *Wanje v Saikwa* (No 2) [1984] KLR 284. A title by adverse possession can be acquired under *Limitation of Actions Act* for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession – (see *Githu -v- Ndeete* [1984] KLR 776).”

10. In *Mtana Lewa v Kabindi Ngala Mwagandi* CA Civil Appeal No 56 of 2014 [2015 eKLR], the Court of Appeal described the concept of adverse possession as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in section 7 of the *Limitation of Actions Act*...”

It is not clear, and the Plaintiff has not told this Court, how the Plaintiff went into occupation of the suit land in 1982. However, what is clear is upto the time the deceased passed away on September 11, 2016 (not in 2015 as stated by the Plaintiff), he (the deceased) had not interfered with the Plaintiff’s occupation and possession of 2.11 hectares out of the 4.0 hectares that is comprised in the title to the suit land. And even as at the time of filing this suit in 2022, the defendants had not interfered with the



Plaintiff's occupation and possession of the said 2.11 hectares which as per the photographs produced, has a visible gate and houses. The Defendants did not enter appearance nor file any response to the Originating Summons. They appear to have no interest in the 2.11 hectares of the suit land occupied by the Plaintiff. And although the registered proprietor of the suit land is deceased, it is clear from the case of *Karuntimi Raiji v M'makinya M'itunga* 2013 eKLR that a claim for adverse possession can be made against the Estate of a deceased person. In this case, the defendants represent the deceased's estate and they have therefore been properly sued in that capacity. And as is also clear from the case of *Githu v Ndeete (supra)* a claim to land by adverse possession can be made for a portion of land so long as it is clearly identified. The plaintiff has testified, and his testimony has been corroborated by his witness Kennedy Masibo (PW2), that the portion which he occupies measures 2.11 hectares and its boundary is well delineated.

11. Having considered the Plaintiff's testimony, un-rebutted as it is, and believing him as I do, I have no hesitation in making a finding that he has proved his case as required in law. He is therefore entitled to the orders sought in his Originating Summons.
12. Accordingly, there shall be judgment for the Plaintiff as against the Defendants, jointly and severally in the following terms:
 1. A declaration is hereby issued that the Plaintiff has acquired by way of adverse possession a portion measuring 2.11 hectares out of the land parcel No Bunyala/Mudembi/1738.
 2. The title of the deceased in the land parcel No. Bunyala/Mudembi/1738 has been extinguished by operation of the law.
 3. The defendants shall within 30 days from the date of this judgment surrender the original title to the land parcel No. Bunyala/Mudembi/1738 to the Land Registrar Busia County for cancellation and also execute all the necessary documents to facilitate the registration of the Plaintiff as proprietor of a portion measuring 2.11 hectares in tandem with the delineated boundaries. The remaining portion of 1.9 hectares shall be registered in the joint names of the defendants.
 4. The Plaintiff shall meet the costs of any survey and registration of the portion measuring 2.11 hectares in his names and 1.9 hectares in the names of the defendants.
 5. In default of (3) above, the Land Registrar Busia shall be at liberty to cancel the title to the land parcel No. Bunyala/Mudembi/1738 notwithstanding the absence of the original title and the Deputy Registrar of this Court shall be at liberty to execute all necessary documents on behalf of the Defendant to facilitate the said registration.
 6. Thereafter, the Defendants either by themselves, their agents, servants or any person acting through them shall be restrained by an order of temporary injunction from entering, encroaching upon, taking possession, sub-dividing, selling, alienating, charging or in any other manner interfering with the Plaintiff's enjoyment of his parcel of land excised out of the land parcel No. Bunyala/Mudembi/1738.
 7. There shall be no orders as to costs.

BOAZ N. OLAO

JUDGE

20TH APRIL 2023



JUDGMENT DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 20TH DAY OF APRIL 2023 AT BUSIA. AND SINCE THE DEFENDANTS DID NOT ENTER APPEARANCE, THE PLAINTIFF SHALL SERVE A COPY OF THIS JUDGMENT ON THEM WITHIN 7 DAYS OF DELIVERY AND FILE AN AFFIDAVIT OF SERVICE. Right Of Appeal

BOAZ N. OLAO

JUDGE

20TH APRIL 2023

